United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2388

To be argued by
JESSE MOSS

In The

United States Court of Appeals

For The Second Circuit

RAYMOND E. KARLINSKY, HOWARD JACOBSON, and HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC., on behalf of themselves and all others engaged in the business of owning, training and racing thoroughbred horses in the United States, who are similarly situated,

Plaintiffs-Appellants,

- against -

THE NEW YORK RACING ASSOCIATION, INC., JOCKEY CLUB, JOHN C. CLARK, JACK J. DREYFUS, JR., JOHN G. GALBREATH, FRANK M. BASIL, G.H. BOSTWICK, JOHN W. HANES, FRANCIS KERNAN, ROBERT J. KLEBERG, JR., JOHN A. MORRIS, PERRY R. PEASE, OGDEN PHIPPS, JOHN M. SCHIFF, ALFRED G. VANDERBILT, JOSEPH WALKER, JR., AND JOHN H. WHITNEY,

Defendants-Appellees.

On Appeal from a Judgment of the United States District Court, Southern District of New York.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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I.

At the time that plaintiffs' brief was being sent to the printer, the *New York Times*, December 17, 1974, p. 46, published a lead story, which, when added to defendants' self-serving actions already shown, effectively demolishes their attempt to wave aside plaintiffs' complaint as inconsequential and frivolous. The Board of Trustees of NYRA announced on December 16, 1974 that $5,000,000 annually would henceforth be added to the stakes program. This shift in the distribution of available purse monies to increase stakes at the expense of overnight purses, substantially changes the purse distribution ratio in favor of the stakes, in which the trustees' special interest is firmly established in the record. Further, it plainly contradicts the Racing Secretary's stated opinion that the reverse would be more equitable and needed to be done (358a).

II.

Defendants' answering brief is less an answer than it is an expression of outrage at the temerity of the horsemen in attacking their established way of racing life. This is not only apparent in the present brief, but was shouted to every court in the related cases which appellees mention, and of course, was universally disregarded by those courts. One of defendants' difficulties seems to be in grasping the idea that an anti-trust case can be short, direct and simple rather than necessarily involved and complicated, and this is so here because the facts are plain, elicited from the mouths of their own witnesses, and unarguable. The reason why defendants see nothing wrong with them seems to be just that they are used to them: that's the way it is and has been.

This leads them into irrelevancies, rather than a discussion of the real issue presented. Thus, after saying that it is "difficult if not impossible for appellees to say what issues are presented for review" and that no issue of law emerges, they wind up with the remarkable statement that: "When all is said and done then the only issue that can be formulated would appear to be: Did the plaintiffs below prove any Sherman Act violation by the defendants?" Our congratulations to defendants! They spotted at once the issue which they said could not be discerned, which just goes to show what you can do when you try.

III.

Conspicuously absent from appellees' brief, is any attempt to defend the rulings of the court below, upon which this appeal is based. They do not even attempt to justify the trial court's theories (1) that because the trustees of the NYRA lawfully acquired many of their powers which gave them control of racing in New York (albeit in their capacity as track operators rather than horsemen racing at those tracks), they are not responsible for anti-trust activities in which they engaged with the Jockey Club, as horsemen, to benefit themselves as such, (2) that even if they did conduct racing in this area in their capacity as horsemen so as to benefit themselves and their particular needs against others, this is just a normal, human tendency which might be expected and therefore, is all right, and (3) the trial court's theories on the nature of the proof required in an anti-trust case.

IV.

Defendants' assumption *arguendo,* that monopoly control exists here, is a necessary assumption because the fact of such control is inescapable. Ignored in the brief, is the conduct of the defendants in creating a pattern of racing here which benefits their own types of horses, including frank admissions that they do so. Also ignored is the clear picture of NYRA collusion with the Jockey Club to create, hold and exercise control of racing for their own benefit.

V.

Of course, the complaint and the proof following it, made it clear that the relevant market referred to, is racing in the State of New York. In fact, on the motion to dismiss, defendants failed in their claim that the complaint was defective because it failed to indicate the market referred to.

But apart from this, the trial clearly established a relevant market area. Kenneth Noe, defendants' Racing Secretary, testified without contradiction that in the quality of racing, types of racing and purses paid, New York was different from racing in other parts of the country, was *sui generis* and in his opinion, better than racing anywhere else (346a-347a). And so, we have the New York area shown as a separate, definable market area to which defendants' activities clearly relate.

VI.

Defendants deny that the NYRA stakes program, particularly at Saratoga, is geared toward the trustees as owners of a substantial proportion of stake horses. Yet the tables which defendants themselves submitted (586a-594a) indicate that for the past ten years Saratoga as always paid exorbitant stakes purses. The Saratoga stakes program is not comparable to that of the other tracks listed, where the same horsemen race together for many months sharing all the money generated at the same track. The meet at Saratoga is a separate meet, admittedly having a different set of horsemen racing there, who require a subsidy and the diversion of money from other sources in order to put on their program of stakes races. The other tracks listed do not involve diversion of monies from other horsemen because their stakes programs are a part of a normal allocation of about 40% to 60% of the track's income for purses. By contrast, Saratoga consistently pays out in purses over 90% of its income, and it is out of this abnormal initial allocation that it pays some of the highest percentages of stakes purses in the country.

VII.

What defendants are really doing here is rearguing the sufficiency of the complaint which was upheld by Judge Lasker. We note that their attempt to support their position relies upon remarks by Judge McMahon in dismissing the first complaint and does not deal with the subsequent complaint, which was upheld and is the one with which we are concerned here.

Plaintiffs narrowed their case to eliminate the implication of the breeders, since the expense and magnitude of bringing them in, would have been prohibitive. Apart from this, every single allegation dealing with the nature of the conspiracy, its formation and the manner in which it was carried forward, was supported by the evidence; evidence we beg to repeat which came uncontradicted from the mouths of defendants' own people and their records. The issue remains; are these anti-trust violations?

Respectfully submitted,

s/ Jesse Moss
Attorney for Plaintiffs-Appellants

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Of Counsel

AMENDED COMPLAINT (Filed April 10, 1970)

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

US COURT OF APPEALS SECOND CIRCUIT

KARLINSKY, et al,
Plaintiffs-Appellants.,

- against -

NY RACING ASSOC.,
Defendants-Appellees.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 4th *day of* February *19*75 *at* 80 Pine St., New York

deponent served the annexed Reply Brief *upon*

~~KKK~~ Cahill, & Gordon

the *in this action by delivering* ~~3~~ 2 *true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 4th *day of* February *19*75

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975